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in the
Supreme Court
of the
United States

OCTOBER TERM, 1970

No.

STERLING NATIONAL BANK OF DAVIE,
Petitioner,

vs.

WILLIAM B. CAMP, Comptroller of the Currency, et al.,
Respondents.

BRIEF OF INDIVIDUAL RESPONDENTS, CHARLES W. LANTZ, BILLIE R. GILL, ARTHUR WOLF, DONALD B. WILBAND, DONALD W. HULMES, HENRY D. PERRY, AND JAMES MEDLIN, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The individual respondents here are the successful applicants for a new national bank charter in Davie, Broward County, Florida. The petitioner is a competing protestant bank. This brief is filed in opposition to the petition.

I

OPINIONS BELOW

The findings and conclusions and the summary final judgment of the trial court are found in the Appendix to this brief (A. 1-4). The findings and conclusions were contained in the Appendix to the Brief of the Comptroller below (1a-5a) and the summary final judgment was found in the printed Appendix of the petitioner, the appellant below, at page 81 (R. 540).

The opinion of the United States Court of Appeals for the Fifth Circuit, affirming the summary final judgment, appears in the Appendix to the petition (P.A. 1-7).

II

QUESTIONS PRESENTED

The individual respondents restate the real issues involved as follows:

> 1) WHETHER THE COMPTROLLER OF THE CURRENCY MUST MAKE WRITTEN FINDINGS AND CONCLUSIONS, OR COME FORTH WITH A FORMAL SUPPORTING OPINION, WHEN HE APPROVES THE CHARTERING OF A NEW NATIONAL BANK, SIMPLY BECAUSE A COMPETING NATIONAL BANK PROTESTS.

NOTE:

P.: Petition for a Writ of Certiorari filed in cause.

P.A.: Appendix to Petition for Writ of Certiorari filed in cause.

A.R.: Refers to Exhibit A of the Record which is the administrative file of the Comptroller's office.

A.: Appendix to this brief, in Opposition to Petition for a Writ of Certiorari.

R.: Record on appeal in court below.

2) WHETHER THE MAILING OF INNOCUOUS PUBLIC NEWSPAPER ARTICLES TO THE COMPTROLLER FOR CONSIDERATION AND APPROPRIATE INCLUSION INTO THE EXTENSIVE ADMINISTRATIVE RECORD, RENDERS THE COMPTROLLER'S GRANT OF A NEW BANK CHARTER INVALID AS ALLEGEDLY BASED ON ILLEGAL SECRET EVIDENCE.

III

STATUTORY PROVISIONS INVOLVED

12 U.S.C.A. §26:

> " . . . before an association shall be authorized to commence the business of banking, the comptroller shall examine into the condition of such association, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each of its directors, and the amount of the capital stock of which each is the owner in good faith, and generally whether such association has complied with all the provisions of this chapter required to entitle it to engage in the business of banking; and shall cause to be made and attested by the oaths of a majority of the directors, and by the president or cashier of the association, a statement of all the facts necessary to enable the comptroller to determine whether the association is lawfully entitled to commence the business of banking."

12 U.S.C.A. §27:

> "If, upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise, it appears that such association is lawfully entitled to commence the business of banking, the comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business. But the comptroller may withhold from an association his certificate authorizing the commencement of business, whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this chapter."

The petitioner claims the "due process" clause, as contained in Article V to the United States Constitution is involved here. The individual respondents do not agree that "due process" is involved here.

IV

STATEMENT OF THE CASE

The petitioner has stated the case in an inappropriate light. The *voluminous* administrative record upon which the Comptroller based his decision, contains a mass of materials which—contrary to the petitioner's statement—virtually mandated the approval of the new bank charter here. It goes without saying that, as the trial court noted, and as the Fifth Circuit confirmed—there was no abuse of discretion, illegality, or arbitrary action in the award to say the least and it was supported by substantial evidence.

The face of the summary final judgment shows that it was based upon the administrative record filed in the cause by the Comptroller. During the pendency of the cause, the Comptroller filed with the Court a 502 page administrative file; bulky exhibits including maps and aerial photographs; and a two volume, 331 page transcript of a hearing before the Comptroller's regional office at which the petitioner was given an extensive opportunity to be heard.

Contrary to the statement of the case by the petitioner, the record reveals full, complete, and thorough administrative exploration by the Comptroller's office of the feasibility and desirability of issuing the new bank charter. It reveals compliance with the appropriate statutes and regulations, a hearing afforded to the protestant bank [and others]; an abundance of material supporting the delicate, expert policy decision of the Comptroller, granting the charter; and a written opinion by the Comptroller's ranking subordinate favoring the issuance of the charter (A. R. 2). Thus, the full record reveals:

a) The Comptroller rendered his decision for approval of the new bank charter in due course, after thorough consideration of the matter, on April 18, 1969 (A. R. 39) well prior to the institution of the action by the petitioner, commenced in District Court on May 29, 1969.

b) The applicant was so notified of the Comptroller's preliminary approval (A. R. 1).

c) The actual certificate of authority issued, in due course on July 30, 1969, almost two months after the suit was instituted—upon approval made in due course *prior* to the suit; and thus the Comptroller never made any decision or performed any act deliberately calculated to frustrate judicial review (See Comptroller's sworn answers to interrogatories; No. 7, 8; filed November 18, 1969 (R. 356-428).

d) Contrary to implications of the petitioner, the Comptroller indeed followed and applied standard and lawful criteria in exercising his *very* broad discretion in granting the charter. Thus, in a sworn answer to an interrogatory, filed on November 18, 1969, the Comptroller stated:

> "Interrogatory 1
>
> Please list all criteria, factors and standards considered by you in arriving at your determination to grant a charter to the applicants to operate the Citizens National Bank of Davie.

Answer to Interrogatory 1

The only 'criteria' governing the issuance of charters to national banks in general or the application for a charter for the Citizens National Bank in particular are set forth in the National Bank Act, 12 U.S.C. §§21, 22, 23, 26, and 27 and plaintiff is directed to these provisions for the terms thereof. Aside from those criteria set forth in the National Bank Act, the Comptroller is unable to list 'criteria' or 'standards' considered in arriving at his determination to grant a charter to the applicants to operate the Citizens National Bank of Davie for the reasons that each application for a national bank charter must stand on its own merits and determinations by the Comptroller to grant to deny such charters are not governed by fixed 'criteria' or 'standards'. In considering the application for a charter for the Citizens National Bank of Davie, the Comptroller considered all of the information as to economic and other 'factors' gathered by the Comptroller's investigating examiners and submitted by the applicant and protestants, including the testimony and argument in the informal administrative hearing held on the application, all of which information is either set forth in the certified copy of the Comptroller's administrative file which has heretofore been filed with the Court in support of the Comptroller's motion for summary judgment or is otherwise described in the Comptroller's certificate which accompanies the certified copy of the administrative file. The Comptroller's determina-

tion to grant a charter for the Citizens National Bank of Davie also was based upon the Comptroller's accumulated experience and his general knowledge of the banking industry as a whole and of banking and economic conditions in the state of Florida in particular." (And see balance of interrogatories 1-22, and answers of Comptroller). (R. 356-428).

e) And, of course, on April 18, 1969, the ranking subordinate recommended approval, in writing, stating his reasons for approval (A. R. 2-3).

f) Contrary to the assertions of the petitioner, the approval was a matter of banking judgment—of a kind and nature peculiarly and *legally* committed to the broad discretion of the Comptroller. And, the only difference between the recommendations of other subordinates, as opposed to recommendation of the ranking subordinate and the decision of the Comptroller, was one of vision, and timing.

i) For example, there could be no dispute that Davie, in Broward County, Florida, is in an area of steady growth in South Florida. Indeed, the investigation report itself reveals *excellent* growth potential; an education complex known as *Nova*, established in the immediate area; and of course, close proximity to Hollywood, Florida (A. R. 61).

ii) Even a negative statement acknowledged "growing pains" in the area (A. R. 71).

The organizers and directors are men of reputation standing and character. Most "are well-known and re-

spected in the Davie area" (A. R. 71). "It [was] expected they [would] work hard for the success of the proposed bank" (A. R. 71).

Management was satisfactory, and experienced, as was proposed capital structure (A. R. 71; 73; 62).

iii) A full public hearing was held on September 11, 1968. The transcript was filed with the Court below.

iv) To be sure, there were factors and subordinates opposed to the charter, including the regional economist (A. R. 78, et. seq.), regional administrator, and others (A. R. 38). But these recommendations were *based* primarily upon the situation at the time in Broward County, South Florida.

v) The ranking subordinate, upon a review of the record—including exhibits, and maps and a 502 page administrative file and a 331 page transcript of the hearing, concluded that "this market has a good potential and development is occurring at a steady pace. It is part of a constantly growing Broward County area" (A. R. 3).

vi) Moreover, "healthy competition" indeed was not unwarranted (A. R. 3). On the administrative record here involved, there is at least an indication of need for such competition (see, A. R. 68-69; complaints of people in Davie; poor service and record keeping procedures; A. R. 2, dissension in protestant bank).

In all events, the written evaluation by the ranking subordinate stated:

April 18, 1969

MEMORANDUM FOR THE FILES:

"Re: New Bank Application
Davie, Florida

Mr. Charles W. Lantz, Agent

The proposed new bank would be affiliated with three existing National Banks (Citizens National Bank of Hollywood, Citizens National Bank of West Hollywood and Citizens National Bank of Miami). The organizers and proposed directors will hold 21% of the stock with the remainder to be distributed to existing shareholders of the three affiliated banks. Any remaining shares will then be offered in the local service area.

Management of the existing banks are considered to be capable and two are rated 1-AS and one is rated 2-AS. The only adverse comment noted by the Regional Office concerning these banks is the below average earnings record; however, they are all profitable and it is believed the trend is favorable and it is of particular interest to note that assets in these banks are clean and it is my personal opinion I would rather have below average earnings and clean assets than a high percentage of classified assets and high earnings.

The existing three affiliated banks have in excess of $1,000,000 in deposits in the proposed market area at Davie. The closest bank to the proposed new bank is the Sterling National Bank of Davie, which opened in 1963. This bank has deposits in excess of $9,000,000 and a review of the record tends to indicate that the Sterling National Bank probably would have enjoyed a greater growth except for internal dissension within the Sterling National Bank and it is believed the Sterling National Bank, being located 2 miles distant, will not be unduly restricted in future growth and their capacity to survive will not be materially affected by this new entry.

The record reflects that this market has a good potential and development is occurring at a steady pace. It is part of a constantly growing Broward County area.

An extensive Hearing was held in Atlanta and it is of particular interest to note that the protestants included the Plantation First National Bank of Plantation, the Guaranty National Bank of Fort Lauderdale, Ocean National Bank of Fort Lauderdale and The First National Bank of Fort Lauderdale. All of the aforementioned are affiliated and have a goodly portion of the market percentage. In addition, other protestants included The Dania Bank, located 6.8 miles to the East, Broward National Bank of Fort Lauderdale, over 8 miles to the Northeast and the American National Bank of Fort Lauderdale.

The Sterling National Bank, located 2 miles to the South, with deposits of $9.1MM, claim that they would be materially affected inasmuch as they have a capital program in the works as well as a new bank building program and that any new entry in the market would be detrimental to their capital stock sale and cause undue hardship for their bank since they have expended additional funds on their plan. It should be noted that the capital program was consummated in October, 1968, and would have no bearing on this proposal at this time. Our experience has been that reasonable and healthy competition does not necessarily affect existing institutions in an area. While strong objections have been raised by the Sterling National Bank to a new entry into this market area of Broward County, it has not been shown that this new entry would not be in the public interest. On the contrary, the interest of the public will be served without an adverse affect upon the Sterling National Bank, the only bank in this immediate market.

On balance, it is concluded that there is a basis to support a new bank in this market, particularly when consideration is given to the fact that it will be affiliated with three existing National Banks and it is recommended that the application be approved, with the title, "Citizens National Bank of Davie".

Thomas G. DeShazo

Deputy Comptroller of the Currency"

(A. R. 2-3)

vi) To be sure, the projected population growth, in precise location and degree, together with industrial growth projections, in this section of Broward County, indeed were the subject of conflicting evaluations, and vigorous opposition. But the Comptroller, on this vast record of aerial photographs, tables, charts, exhibits, testimony and opinions (A. R. 1-502)[1]; of course could—and did—determine in his discretion that the new bank charter should issue now (not later). This was just the type of decision the law commits to his expertise.

Because the decision of the Comptroller thus fell well within the confines of lawful decision making, the summary judgment was granted, and the Fifth Circuit affirmed.

V

ARGUMENT

REASONS FOR DENYING WRIT

1) THE COMPTROLLER OF THE CURRENCY ON A CONTESTED BANK CHARTER APPLICATION HAS NO DUTY TO SUPPORT APPROVAL OF THE BANK CHARTER WITH SPECIFIC OR WRITTEN FINDINGS OF FACT OR A REASONED OPINION, NOR DOES DUE PROCESS OR ANY STATUTE OR DOCTRINE IMPOSE ANY SUCH DUTY UPON HIM.

---

[1]The petitioner merely has touched upon the matter before the Comptroller. Obviously, the entire file was before him, to be considered in the light of his expertise.

Of course, as we have demonstrated, the considerations involved in favorable action were certainly revealed in the memorandum of the ranking subordinate (A. R. 2); and factors and materials considered were set forth in sworn answers to interrogatories dated November 18, 1968. Thus, there were in effect, written reasons—so far as it is possible to give them in a case of this kind, involving informal information accumulation and evaluation under applicable Congressional Statutes.

This is more than is required in a case of this kind.

It can hardly be disputed that the approval of a new bank charter by the Comptroller of the Currency is not dependent upon a formal adversary hearing. Indeed, in a like case the Fifth Circuit Court of Appeals in *Citizen's National Bank of Hattiesbury v. Camp*, 5 Cir. 1968, 387 F.2d 375, 376 said:

> "The present applicable statutes and regulations to not require the Comptroller to hold a formal adversary hearing in determining whether to approve the chartering of a new bank. The action of the Comptroller is not subject to review by trial de novo. The Court may not substitute its judgment for that of the Comptroller.
>
> "Upon the present record we cannot hold that the Comptroller denied the appellants a full and fair opportunity to oppose the granting of the charter, that he acted arbitrarily or otherwise illegally".

This court, of course, *denied* certiorari, 391 U.S. 904, 88 S.Ct. 1652.

In the *Hattiesburg* case, of course, the appellant was challenging the approval of an application of a new bank charter. The Fifth Circuit cited in support of its decision, 12 U.S.C.A. §21, 22 & 26; 12 C.F.R. §4.2; *Webster Groves Trust Co. v. Saxon*, 8 Cir. 1966, 370 F.2d 381; and Davis, Administrative Law Treatise, §4.04. Thus the law is clear: no statute or authority or regulation requires a formal adversary proceeding when the Comptroller considers and passes upon applications for new bank charters.

In *Webster Groves Trust Co. v. Saxon*, supra, 8 Cir. 1966, 370 F.2d 381, the 8th Circuit squarely held that neither the National Bank Act, nor the Administrative Procedure Act, nor procedural due process under the Federal Constitution required the Comptroller of the Currency to hold a formal hearing at which commercial banks could present objections relative to issuance of a national bank charter.

The Court, in Webster Groves, specifically referred to 12 U.S.C. §27 of the National Bank Act. The Act, after enumerating the detail requirements, authorizes the Comptroller, under §27, to issue a certificate of authority:

> "If, upon a careful examination of the facts so reported, *and of any other facts which may come to the knowledge of the Comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise*, it appears that such association is lawfully entitled to commence the business of banking . . . " (Emphasis supplied)[2]

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[2]The preceding section of the National Bank Act fully complied with, provides only that (12 U.S.C. 26):

The Court, in *Webster Groves*, (370 F.2d at 384), concluded that the National Banking Act, 12 U.S.C. 121 et. seq., the source of the Comptroller's powers and duties in granting a National Bank Charter, sets forth no requirement of a formal hearing on an application for a charter. It noted the Comptroller's practice for over 100 years in proceeding informally on new bank applications and pointed out that the practice had received the approval of the Attorney General's Committee on Administrative Procedure, and had gone unchallenged in the appellate courts for the same period of time.

The *Webster Groves* decision, in footnote and body (pages 384-385) in a well-reasoned opinion—adopted by the Fifth Circuit in *Hattiesburg*, supra—points out that "a *formal adversary type hearing would be of little benefit to him [the Comptroller] in the discharge of his discretionary powers*". (Matter in brackets and emphasis supplied). *This is so because of the "very nature of the decision required by the Comptroller". The Court reasoned that "severe public cross-examination" of bank applicants and "public presentation of unfavorable evidence" and dis-*

. . . before an association shall be authorized to commence the business of banking, the comptroller *shall examine into the condition of such association, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each of its directors, and the amount of the capital stock of which each is the owner in good faith*, and generally whether such association has complied with all the provisions of this chapter required to entitle it to engage in the business of banking; and shall cause to be made and attested by the oaths of a majority of the directors, and by the president or cashier of the association, a statement of all the facts necessary to enable the comptroller to determine whether the association is lawfully entitled to commence the business of banking.

closure of "*future plans and programs to competitors*" *would adversely affect* "*public confidence in the banking system*". (370 F.2d at 885).

And, as the Attorney General's Committee—quoted with approval by the *Webster Groves* Court—shows, the ultimate questions as to whether or not certain individuals are suited to engage in the banking business, or whether the community needs a bank, or whether a bank should be insured and similar questions are based upon many imponderables "*calling for almost intuitive special judgments so that hearings are not ordinarily useful. The banking business is a delicate one so that the advantages and importance of ready and frank information may outweigh the damages of accepting confidential information*" (370 F.2d 885 (footnote) and considering information obtained in a manner other than upon a formal adversary proceeding. [Emphasis supplied.]

Finally, in the *Webster Groves* case, the Court carefully pointed out that nothing in the Administrative Procedure Act and in particular nothing in 5 U.S.C. 1009(e) (now §706; also known as §10(e) of the Act) requires a formal quasi-judicial hearing in a case like this, and that due process does not require such a hearing. There is simply no statutory requirement here of a formal adjudicative proceeding and determination. See 5 U.S.C. §553-557.[1]

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[1]Nothing in the Administrative Procedure Act requires findings in a case like this. Instead the requirement in that Act that certain decisions include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record . . . ," 5 U.S.C. 557(c)(3), specifically "applies . . . when a hearing is required to be conducted in accordance with section 556 of this title" 5 U.S.C. 557(a). Hearings in accordance

No case cited by the petitioner, in any way, shape or form suggests that in this particular area of the law, any formal adversary proceeding is required. Here, the petitioner had a full opportunity to be heard. Indeed, it was afforded the opportunity of interrogating the applicants for the new bank through its counsel and to present witnesses in opposition. It was afforded even more (see Webster Groves, 370 F.2d 384-86; and footnote 1) than the law actually entitled to it. It had opportunity to be heard (see *Citizen's National Bank of Hattiesburg* v. *Camp*, supra.) The law required no more of the Comptroller.

The need for reasoned findings of fact in an opinion is peculiar to determinations made in judicial proceedings or quasi-judicial proceedings where the decision is predicated upon a formal adversary proceeding. It is required

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with section 556, in adjudicatory matters, are required in cases of adjudications "required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. 554(a). But no such hearing is required on bank charter applications. 12 U.S.C. 27; *Webster Groves Trust Co.* v. *Saxon*, 370 F.2d 381, 384-86 (C.A. 8).

Congress, although well aware of the Comptroller's long-standing practices, has not sought to alter them by statute. The strong implication is that Congress does not view such practices as contrary to its intentions. E.g., Report of Attorney General's Committee on Administrative Procedure, Sen. Doc. 8, 77th Cong., 1st Sess., p. 452 (1941): "In the event that the application to organize a national bank is denied, the applicants are briefly notified to that effect, but no grounds for disapproval are stated." Indeed, while the staff of Attorney General's Committee on Administrative Procedure was critical of the *denial* of applications without stating reasons (Monograph of Attorney General's Committee on Administrative Procedure on Federal Control of Bank, Sen. Doc. 186, 76th Cong., 3d Sess., Par 13 (1940), pp. 11-13), no steps were taken by Congress to change the procedure. Moreover, the staff monograph is noteworthy in its omission of any suggestion that either a formal hearing be accorded objecting competitors, or that they should be given written statements which were recommended for disappointed applicants.

where the administrative agency is in truth and in fact and in actuality performing a judicial act. In other words, where the decision of the agency, due to some statute or precedent—must be based upon an adversary proceeding or record of adversary proceedings, then there might well indeed be a duty for the administrative agency to make findings of fact or a reasoned opinion. But there is no such adjudicative proceeding involved here and no conceivable reason for the actual filing of findings and an opinion. Many intangibles go into the decision and many sources of information are drawn upon. As this Court noted in *Hattiesburg*, where the opposition has had a full opportunity to be heard in opposition, then they cannot be heard to complain. Their own complaint shows that they were afforded an opportunity to be heard.

The argument advanced here for all practical purposes was rejected in *Webster Groves Trust Co. v. Saxon*, supra. The Court there rejected the argument that because a right of review might exist, a formal hearing and a record to aid in that review were required. This argument specifically was renounced by the 8th Circuit in the *Webster Groves* case. Cases requiring formal findings by an agency are in areas where the decision is indeed totally based on a hearing judicial in nature, required as a matter of due process or administrative or statutory law.

In this area of the law, however, involving approval of new bank charters, the authorities unanimously have upheld the Comptroller, notwithstanding absence of a written opinion: *Citizens National Bank of Hattiesburg v. Camp*, supra; *Webster Groves Trust Co. v. Saxon*, supra; and *Warren Bank v. Camp*, 6 Cir. 1968, 396 F.2d 52.

Even if no findings of fact were made here, or even if no reasoned opinion were filed, such is not required in a proceeding of this kind. There is no need at all for a formal adversary proceeding and accordingly, there would be no basis for formal findings of fact based upon evidence. Nor could a legal type opinion be submitted. The administration of banking does not lend itself to such procedures and the Courts have so held. Delicacy and assessment of many imponderables is involved. There is no requirement for findings and, or, an opinion.

Thus the trial court in granting summary judgment, quite properly stated in material part:

> The two procedural questions raised by the plaintiff which he contends have resulted in denial of due process to him are, first, the question of failure of the comptroller to enter a written or formal findings. In the pleadings the plaintiff refers to the Rule. I am assuming that the Rule here is the one which appears in Title 5 at Section 555(e). If there is another rule I would like to have it cited to me. That is the one I find. It reads "Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding.
>
> • • •
>
> The second sentence of 555(e) reads:
>
> "Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial."

Now the petition here under consideration is the petition of the new bank, that is, the petition for new bank charter, and the petition filed by the Sterling National Bank was simply a petition in opposition to it. The section of the Rule just read provides that the administrative officer must give a brief statement of grounds when he denies a petition. It doesn't say when he grants one. If it were intended that you could file a negative petition, that is one in opposition, and then get a ruling, accompanied by grounds on that negative petition, then it frustrates the terms in which this Rule was written. On the other hand, although this is my belief of the intent of this Rule, if that is not correct, nevertheless the notice, that is, the grounds need not be given when the denial is self-explanatory.

Well, here the petition was granted thus holding that the need and convenience of the public would be served by granting the petition of those who sought the new national bank charter. It therefore seems evident that the denial or refusal to grant the opposing petition is obvious, that is, it is the reverse of that. It seems to me that is the sense of 555(e).

The other procedural defect was the question of ex parte communications. Well, the procedure by which the Comptroller makes his investigations and arrives at a decision on whether or not to grant a bank charter is founded in the main on unilateral investigatory procedures within the department. This is the principal protection that the public has, that bank charters not be indis-

criminately issued and that banks not be chartered where there is no convenience and necessity served. So that by its very nature the actions of the Comptroller are ex parte.

The showing that has been made here in the file with respect to the applicant's ex parte representations are of the most innocuous kind. It is my view that there has been no denial of due process by reason of ex parte communications, unilateral investigations by the Comptroller nor by the failure of the Comptroller to make formal written findings nor by any failure to afford the Sterling National Bank its opportunity to present its case. One or more cases flatly hold that formal written findings are not required.

With respect to the scope of review of the Comptroller's actions, that is on the merits of the showing of convenience and necessity, of course it is not even the substantial evidence rule but rather it is a review which is intended to assure that the Comptroller's acts are not arbitrary, capricious nor otherwise contrary to law. The administrative file which is here before the Court is replete with evidence which would support either view. The Comptroller decided that it supported the convenience and necessity of the new bank.

So it is the view of the Court that there are no genuine issues of material fact and that a summary judgment should be entered for these defendants. (A. 1-5).

• • •

In affirming, the Court of Appeals, after stating the facts, quite appropriately said, with regard to *both* issues involved (P.A. 3-7):

> It has always been recognized that this legislation confers vast discretion on the Comptroller to approve or disapprove a new charter application. *Warren Bank v. Camp*, 6 Cir. 1968, 396 F.2d 52; *Webster Groves Trust Company v. Saxon*, 8 Cir. 1966, 370 F.2d 381; see *Ramapo Bank v. Camp*, 3 Cir. 1970, 425 F.2d 333; *Federal Home Loan Bank Board v. Rowe*, D.C. Cir. 1960, 284 F.2d 274. As a result of the wide discretion vested in the Comptroller, every court which has considered the matter has concluded that judicial review is limited to determining whether or not the action of the Comptroller was arbitrary, capricious, an abuse of discretion, or otherwise not in accord with the law. *Ramapo Bank v. Camp, supra; Warren Bank v. Camp, supra; Citizens Bank of Hattiesburg v. Camp*, 5 Cir. 1968, 387 F.2d 375, *cert. denied*, 391 U.S. 904; *Webster Groves Trust Co. v. Saxon, supra.*
>
> Evaluating the Comptroller's action in this case, we find not the slightest indication that he overstepped his authority or acted capriciously and arbitrarily. With respect to the question of whether or not there was a reasonable case on the merits for approving a new bank, the district court stated that "the administrative file is replete with evidence which would support either view." We agree. The Comptroller decided that the evidence supported the necessity of the new bank. We are not free to reverse the Comp-

troller's exercise of discretion and substitute our view of the merits for his. *Webster Groves Trust Co. v. Saxon, supra.* The administrative file plainly shows that the charter grant involved here was not made arbitrarily, capriciously, or in violation of the law. The grant must therefore be upheld. *Citizens Bank of Hattiesburg v. Camp, supra; Webster Groves Trust Co. v. Saxon, supra.*

Sterling Bank claims, however, that despite the evidence supporting the Comptroller's action, his award was unlawful because (1) he received ex parte secret information from the charter applicants, and (2) he did not accompany his award with a written opinion stating the reasons for his action. Both contentions are without merit.

Sterling Bank's first argument, that the Comptroller acted unlawfully by considering evidence obtained ex parte from the applicants, is nothing more than another way of contending that the Comptroller must obtain his information from a formal adversary hearing before he approves or disapproves a new bank application. This contention has been completely rejected in cases involving both new bank charters and branch charters. *Rama se Bank v. Camp, supra; Warren Bank v. Camp, supra; Citizens Bank of Hattiesburg v. Camp, supra; Webster Groves Co. v. Saxon, supra; First National Bank of Smithfield, North Carolina v. Saxon,* 4 Cir. 1965, 352 F.2d 267, *aff'd.* 385 U.S. 252. In rejecting the contention that the Comptroller must always hold an adversary hearing, the courts have most often relied

on the wording of the National Banking Act which authorizes the Comptroller to base his decision on facts reported in the application and "any other facts which may come to the knowledge of the comptroller, whether by means of a special commission appointed by him . . . *or otherwise* . . . ." 12 U.S.C.A. § 27 (emphasis added).

The wording of the statute clearly authorizes the Comptroller to obtain his facts in a variety of ways. Since no formal adversary hearing is required and the Comptroller is authorized to obtain information by special commission "or otherwise," it is obvious that the Comptroller committed no unlawful action when he accepted and perhaps considered information sent to his office by some of the applicants, even though this was done without the knowledge of those opposing the charter.

Moreover, in our view some of the same considerations which led Congress to exempt the Comptroller from the necessity of holding a formal adversary hearing also excuse him from filing a written opinion expressing his reasons for granting or denying an application. In *Webster Groves Trust Co. v. Saxon*, *supra*, the court explained:

> "The very nature of the decision required by the Comptroller indicates that a formal adversary type hearing would be of little benefit to him in the discharge of his discretionary powers. There is the further factor present that if bank applicants were subjected to severe

public cross-examination, public presentation of unfavorable evidence and were forced to disclose their future plans and programs to competitors, public confidence in the banking system could be adversely affected." 370 F.2d at 385.

Accord, Federal Home Loan Bank Board v. Rowe, supra. See also *Warren Bank v. Camp, supra.*

The very considerations which make it undesirable to subject applicants to public cross-examination make it equally undesirable to compel the Comptroller to publish an opinion concerning his reasons for granting or denying a charter. The damage to public confidence would be the same no matter which way the confidential information became public. The statute clearly does not require that the Comptroller support his decision with a written opinion, and we think it would be ill-advised for this court to impose a requirement which Congress has not seen fit to demand. We conclude, therefore, that there was nothing unlawful in the Comptroller's action in granting the charter without a written opinion.

In sum, Sterling Bank was given a full and fair hearing to express its opposition to the new charter. The Comptroller decided against its position. Although we cannot chart the subjectives of his discretionary decision, it was obviously based on a composite of many factors and much data. To say that one fact was erroneous and that another fact was askew is not to infest the Comptroller's exercise of discretion with the scent of arbitrariness or capriciousness sufficient to set

aside his decision. These are words of pejoration and must be supported by factual muscularity. Hypothets of error will not suffice. Here such factual muscularity is lacking, and as a result we cannot fault the Comptroller's decision. We find, therefore, that the charter for the new bank in Davie, Florida, is valid and should not be set aside by this court. In No. 27,988 the appeal is DISMISSED. In No. 29,424 the judgment of the district court is AFFIRMED. (P.A. 3-7)

The survey of the law in the opinion below, supported *unanimously* by the authorities, governs.

2) COMPTROLLER OF THE CURRENCY MAY IN PART BASE HIS DECISION TO DENY A PROTEST OF THE GRANTING OF A NATIONAL BANK CHARTER UPON INFORMATION RECEIVED FROM SOURCES OTHER THAN WITNESSES AT AN ADVERSARY PROCEEDING.

The petitioner in this matter urges basically that the decision of the Comptroller here was predicated upon ex parte information delivered to him by the applicants or their representatives.[4]

---

[4]As a matter of fact, as answers to interrogatories filed in the cause herein and the Administrative Record reveal, and as the petitioner readily concedes, the only so-called "ex parte" communications between the applicants and the Comptroller were a series of letters from the applicants to representatives of the Comptroller containing various newspaper clippings and one telephone inquisitory call to a deputy Comptroller; all of which is clearly and fully contained in the administrative file and all of which clearly was pointed out in answer to interrogatories below.

In its brief, the petitioner—who somehow feels it is entitled to a monopoly in the area—has selected several innocuous newspaper articles demonstrating growth in South Florida and Broward County, with covering letters, sent by a representative of the defendants-applicants to the Comptroller as indicative of some *sub-rosa* arrangement. It has selected these from a virtual flood of exhibits, photos, and charts, and hundreds of pages of hearing transcripts; and inside out consideration of the issue, and urges that somehow these *public newspaper articles poisoned the atmosphere.*

But the articles were innocuous in the big picture, and in any event properly could be considered—if they were—regardless of how brought to the attention of the Comptroller.

Of course, there can be absolutely no question that the Comptroller may consider matter apart from that adduced from witnesses under oath or may consider materials or information other than that presented on an adversary proceeding in making his final determination. Certainly, he would be entitled to consider South Florida newspaper articles in any event, see 12 U.S.C. §26-27; *Saxon* supra. Nothing would be more natural to consider.

And again, this is an issue that is not new and has been specifically passed upon even in cases of truly secret information; see *Webster Groves Trust Co. v. Saxon*, supra, (cited with approval by Fifth Circuit in *Hattiesburg*, supra), 8 Cir. 1966, 370 F.2d 381 at pages 383-384; see footnote one, page 384-385 (for authority against advisability of public disclosure and full cross-examination of applicants and against advisability of adversary proceed-

ings and in favor of acceptance of confidential information; see excerpt from report of the Attorney General's Committee on Procedure, pages 142-143; Senate Document No. 8, 77th Congress, First Session, quoted at 370 F.2d, page 384.)

In *Warren Bank v. Camp*, 6 Cir. 1968, 396 F.2d 52 the Court held that the opposition is not entitled to probe operation of the Comptroller's mind to determine why the Comptroller sees fit to exercise his discretion as he does in relation to the grant of a charter; the case is extremely relevant here. It shows that ultimate evaluation and assessment of all imponderables in granting a bank charter is a matter of discretion for the Comptroller and unless he acts totally unlawfully, capriciously or abuses his discretion or otherwise acts outside the law, then his determination must stand.

The *Warren Bank* case, supra, is revealing indeed because of its similarity, on the ultimate merits, to this case. There, as here, subordinates apparently had recommended against the issuance of the charter. In *Warren Bank v. Camp*, supra, as here, summary final judgment was entered in favor of the Comptroller based upon the administrative files developed in the investigation, and at the administrative hearing; the files revealed basic factors essentially similar to the factors contained in the file here. The administrative file and the entire record reveal that the Comptroller considered a mass of material before acting upon the application here. The newspaper clippings were innocuous, certainly did not qualify as *secret* ex parte information, and in any event the Comptroller was entitled to evaluate them for what they were worth. Certainly public newspaper articles, openly mailed

to the Comptroller's office, do not justify the characterizations utilized by the appellant. There is nothing secret about the mass-media, to say the least—nor did these respondents begin a "nighttime campaign to bombard the Comptroller's office secretly" with materials, because they "failed in the daylight" (petition, page 8). They did not know that any subordinates were disposed to recommend against approval. The name-calling is unwarranted and uncalled for.

The respondents dignify the accusations by answering them. The Comptroller easily could have picked up the very public articles complained about at any sophisticated newsstand anyway. The record reveals—and even the plaintiff-petitioner cannot contest this—that the individual respondents are men of integrity, responsibility and reputation. Naturally they sought approval, and one telephone call by one of them asking if any action had been taken—to which the Comptroller's office politely responded that advice would forthcome in due course—was far from evil. (A.R. 11). With reference to these harmless communications, the trial court said:

> "The showing that has been made here in the file with respect to the applicant's ex parte representations are of the most innocuous kind". (A. 4)

The opinion below, and the trial court's ruling, carefully analyze the applicable law; both ruling and opinion are contained in the appendices herein. (See, P.A. 1-7; A. 1-4). The law and authorities cited therein govern here. There is no merit to the petitioner's position, and no conflict in the decisions.

3) CASES CITED BY PETITIONER INAPPLICABLE HERE AND TOTALLY IRRELEVANT.

1. *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 87 L.Ed. 626 (1942); and 332 U.S. 194, 91 L.Ed. 1995 (1946), hold only that an administrative order, requiring a judicial determination, must be supported by grounds. In those cases, the Public Utilities Holding Company Act of 1935 specifically required notice and opportunity to be heard to parties interested in a proposed reorganization plan. Moreover, administrative action, under the act, was based on *judicial principles of equity*. Thus, clearly, a hearing was required, and judicial principles applied; therefore the grounds of the order had to be stated.

This is a far cry from the situation which obtains here, where the Comptroller, under an entirely different congressional act, not even requiring a hearing, awards a new bank charter in accordance with established administrative procedures, repeatedly approved in the courts.

2. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 79 L.Ed. 446 (1935) holds simply that where violation of an administrative order leads to *criminal* punishment, due process requires that the order is within the authority of the administrative body, "*and, if that authority depends upon determinations of fact, those determinations must be shown*". [Emphasis Supplied].

The case involving the NLRA, is dated, obviously distinguishable as involving punishment for a crime and a requirement of findings of fact, and totally inapplicable here. It goes without saying that it does not involve ap-

proval of a new bank charter under the National Banking Act, 12 U.S.C. §§26-27; or the procedural requirements for awarding a new bank charter.

3. *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), holds that termination of welfare payments, under state law, require a hearing and confrontation, as a matter of due process, prior to the termination and not thereafter. There, the New York State procedure provided for a full scale adversary hearing, *subsequent* to the termination. This was a deprivation of due process, as this court held. This court said that in "*almost* every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses". (Emphasis supplied). In such a situation, disclosure of the evidence used to prove the government's case was required.

But the welfare situation in *Goldberg v. Kelly*, in which a man's livelihood was at stake, is a far cry from the situation here, involving a new bank charter. In *Goldberg v. Kelly*, of course questions of fact were required and a formal adversary proceeding indeed was a *statutory predicate* for termination. This court properly struck down a procedure wherein a man's livelihood was terminated first and his opportunity to be heard came thereafter. There, of course, the statute required a hearing and this court simply held that due process required that the hearing be held prior to the termination.

Here, of course, no adversary hearing is even required under the statute; and no deprivation of anyone's livelihood is involved. *Goldberg*, to say the least, was not concerned with the National Banking Act, or administra-

tive prerequisites for approval of a new bank charter under a Congressional Act. The petitioner here was indeed heard and has no legal complaint.

4. *First National Bank of Smithfield v. Saxon*, 4 Cir. 1965, 352 F.2d 267, supports the position of the *respondents* here and indeed was cited in the opinion below in support of the respondents. The petitioner cites only the dissenting of opinion in its brief. Obviously, there is no conflict between the decision in *Smithfield*, and the decision of the Court of Appeals here.

5. *Whitney National Bank v. Bank of New Orleans*, 379 U.S. 411, 13 L.Ed.2d 398 (1965), likewise in no way supports the petitioner's position. The petitioner merely cites a clause, not directly relevant here, from the dissenting opinion.

There is simply no showing of any reason at all for granting the writ, and the cases cited by the petitioner are totally inapplicable and distinguishable.

4) NO CONFLICT IN DECISIONS OR ANY OTHER BASIS FOR GRANTING WRIT DEMONSTRATED IN PETITION.

The individual respondents here, who applied for the charter for the new bank, believe that the petitioner is attempting to show that there is a conflict between the Circuit Courts of Appeal on the issues involved here; or that the decision below is not in accordance, on a substantial question of federal law, with applicable decisions of this court or with the way in which this court would decide the questions.

This is simply not the case. The courts unanimously have applied the law under the National Banking Act in precisely the same way as the courts below did here. *Warren Bank v. Camp*, 6 Cir. 1968, 396 F.2d 52; *Webster Groves Trust Co. v. Saxon*, 8 Cir. 1966, 370 F.2d 381; see, *Ramapo Bank v. Camp*, 3 Cir. 1970, 425 F.2d 333; *Federal Home Loan Bank Board v. Rowe*, D.C. Cir. 1960, 284 F.2d 274; *Citizens Bank of Hattisburg v. Camp*, 5 Cir. 1968, 387 F.2d 375, cert.den., 391 U.S. 904; *First National Bank of Smithfield, North Carolina, v. Saxon*, 4 Cir. 1965, 352 F.2d 267. See also specific provisions of 12 U.S.C. §27: [the wording of the National Banking Act authorizes the Comptroller to base his decision on facts reported in the application and "*any other facts which may come to the knowledge of the Comptroller, whether by means of a special commission appointed by him . . . or otherwise*".]. There is a strong public policy under the National Bank Act in conducting the licensing procedure just as it was here. There is nothing involved which in any way, shape, or form violates due process or the statute involved or any doctrine of administrative law.

The procedure, under the statute—to say the least—was followed. The statute or the constitutionality of the National Banking Act has not even been challenged on this proceeding. Under any test of scope of review, the action of the Comptroller must be sustained. As the trial court held (A. 5): "The administrative file which is here before the court is replete with evidence which would support either view. The Comptroller decided that it supported the convenience and necessity of the new bank".

The trial court therefore ruled that there was substantial evidence, no abuse of discretion and that the Comptroller's acts were not arbitrary, capricious, or otherwise contrary to law. There is absolutely no indication of any deprivation of due process, or violation of any statutory provision, or deprivation or violation any procedure mandated by the Administrative Procedure Act or any principles of administrative law.

Readily distinguishable are cases which suggest that in some instances, where it is not clear what considerations generally are employed in passing on license applications, due process may require that an *applicant* be given reasons why his application is denied, and he is therefore precluded from engaging in the licensed business.

Here by contrast, the Comptroller's regulations (12 C.F.R. 4.2) do state the general considerations applicable, as do the various recommendations of his subordinates. Moreover, the petitioner Sterling Bank had full access to the application and economic evidence of the application, and hence knew what arguments it had to meet. Furthermore, Sterling is not being excluded from the area of endeavor which is licensed. Instead, Sterling Bank is merely a competitor that is trying to preserve a favored position by precluding another bank from entering the area. No notions of due process require that Sterling Bank be given detailed reasons by the head of the agency, why it has been unsuccessful in excluding a competitor. Indeed, we do not believe that on the merits, the National Bank Act affords the petitioner a "legal interest" which

protects it against licensing of competitor banks here. See, *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 25 L.Ed.2d 184 (1970). Be that as it may, the petitioner *was* afforded a full hearing; and this was more than it was entitled to at the administrative level; and everything in the administrative file was made available to it at the trial court level.

There is just a mass of materials supporting the Comptroller's determination here; a mass of evidence and information supports the administrative evaluation involved here; and the determination was lawfully made and discretion lawfully exercised. The Comptroller's determination had to be confirmed and properly was confirmed in both courts below. The petitioner here seeks only to "review evidence and discuss specific facts", *United States v. Johnston*, 268 U.S. 220, 227, 45 S.Ct. 496-497 (1925) in the guise of this Petition for a Writ of Certiorari. Further, to warrant Rule 19 attention, the issues must be "beyond the academic or the episodic"; *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955).

This simply is not a case where certiorari is warranted or required. The law is settled both procedurally and on the merits and the Comptroller's conduct and the confirmation by the courts below was totally correct.

VI

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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VII

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on this day of December, 1970, three copies of this Brief of Individual Respondents were mailed, postage prepaid to the following attorneys of record:

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and
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Hon. William D. Ruckelshaus,
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and
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(Certificate of Service Continued on Next Page)

I FURTHER CERTIFY that all parties required to be served have been served.

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APPENDIX

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 69-654-Civ-TC

STERLING NATIONAL BANK OF DAVIE,
a national banking association,

Plaintiff,

v.

WILLIAM B. CAMP, Comptroller of the Currency, et al.,

Defendants.

Miami, Florida
January 12, 1970

FINDINGS AND CONCLUSIONS

THE COURT: The Court finds and concludes that the plaintiff does have standing to bring this suit and that the Court has jurisdiction.

The administrative file, with certain exceptions, is before the Court. The omissions, as I believe I recited in one of my earlier orders on some discovery questions, in the main are not matters that the plaintiff is entitled to in any event and we can say, therefore, that a hearing has been held, that the plaintiff has had ample opportunity to present his position there.

The two procedural questions raised by the plaintiff which he contends have resulted in denial of due process to him are, first, the question of failure of the comptroller to enter a written or formal findings. In the pleadings the plaintiff refers to the Rule. I am assuming that the Rule here is the one which appears in Title 5 at Section 555(e). If there is another rule I would like to have it cited to me. That is the one I find. It reads "Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding."

Is that the one, Mr. Kenny?

MR. KENNY: Your Honor, that is the section of the Administrative Procedure Act which was specifically referred to and we believe it was our position in the pleadings, as correctly interpreted by the Court, that the denial of our formal protest was an outcome, a finding, a determination within the meaning of that Rule.

THE COURT: I do not think I have made such a determination. If I have I want to state my position on it at this time.

The second sentence of 555(e) reads:

> "Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial."

Now the petition here under consideration is the petition of the new bank, that is, the petition for new bank charter, and the petition filed by the Sterling Na-

tional Bank was simply a petition in opposition to it. The section of the Rule just read provides that the administrative officer must give a brief statement of grounds when he denies a petition. It doesn't say when he grants one. If it were intended that you could file a negative petition, that is one in opposition, and then get a ruling, accompanied by grounds on that negative petition, then it frustrates the terms in which this Rule was written. On the other hand, although this is my belief of the intent of this Rule, if that is not correct, nevertheless the notice, that is, the grounds need not be given when the denial is self-explanatory.

Well, here the petition was granted thus holding that the need and convenience of the public would be served by granting the petition of those who sought the new national bank charter. It therefore seems evident that the denial or refusal to grant the opposing petition is obvious, that is, it is the reverse of that. It seems to me that is the sense of 555(e).

The other procedural defect was the question of ex parte communications. Well, the procedure by which the Comptroller makes his investigations and arrives at a decision on whether or not to grant a bank charter is founded in the main on unilateral investigatory procedures within the department. This is the principal protection that the public has, that bank charters not be indiscriminately issued and that banks not be chartered where there is no convenience and necessity served. So that by its very nature the actions of the Comptroller are ex parte.

The showing that has been made here in the file with respect to the applicant's ex parte representations are of the most innocuous kind. It is my view that there has been no denial of due process by reason of ex parte communications, unilateral investigations by the Comptroller nor by the failure of the Comptroller to make formal written findings nor by any failure to afford the Sterling National Bank its opportunity to present its case. One or more cases flatly hold that formal written findings are not required.

With respect to the scope of review of the Comptroller's actions, that is on the merits of the showing of convenience and necessity, of course it is not even the substantial evidence rule but rather it is a review which is intended to assure that the Comptroller's acts are not arbitrary, capricious nor otherwise contrary to law. The administrative file which is here before the Court is replete with evidence which would support either view. The Comptroller decided that it supported the convenience and necessity of the new bank.

So it is the view of the Court that there are no genuine issues of material fact and that a summary judgment should be entered for these defendants.

• • •

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Civil No. 69-654-Civ-TC

(R. 540)

STERLING NATIONAL BANK OF DAVIE,
a national banking association,

Plaintiff,

v.

WILLIAM B. CAMP, Comptroller
of the Currency, et al.,

Defendants.

SUMMARY FINAL JUDGMENT

This matter having come before the Court on defendant William B. Camp's motion to dismiss or in the alternative for summary judgment and upon the motion of defendants Charles W. Lantz, Billie R. Gill, Arthur Wolf, Donald B. Wilband, Donald W. Hulmes, Henry D. Perry and James Medlin for summary judgment, and upon consideration of the pleadings filed herein and the administrative record of the Comptroller of the Currency filed in support of the defendants' motions, and upon consideration of the argument made by counsel for the parties in open court, and it appearing to the Court that there exists no genuine issue of material fact and that defendants are entitled to judgment as a matter of law, it is by the Court this 20th day of January, 1970,

ORDERED AND ADJUDGED that:

(1) Summary judgment be and the same hereby is granted for defendants; and

(2) Plaintiff shall take nothing, by its complaint and the defendants, shall go hence without day.

Ted Cabot
United States District Judge